88- No 1736

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

DANIEL M. WEMHOFF,

Petitioner,

vs.

WILLIAM E. FLORIA &

INVESTORS MANAGEMENT

CORP. OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the District of Columbia

Court of Appeals

DANIEL M. WEMHOFF,

Pro Se, J.D.

5791 A Winston Ct.

Alexandria, Va. 22311

Local 538-9117

Before May 15 (904) 441-5275

Petitioner

ANTHONY M.ALEXIS

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23pp

QUESTIONS PRESENTED

Is the Claimant-petitioner denied his Day in Court, guaranteed by the Due Process clause of the Fourteenth Amendment to the U.S. Constitution, when in a contract action, his alternative pleading in quantum meruit, necessary to the outcome of his claim, is bifurcated from the trial, by the court with the concurrence of the Respondents, when the same equitable claim is barred as res judicata by the same court in a later filing.

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No.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the District of Columbia

Court of Appeals

To the Honorable Chief Justice and Honarable Associate Justices of the Supreme Court of the United States.

The Petitioner, Daniel M. Vemhoff, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on February 1, 1989.

OPINIONS BELOW

The unreported opinion (pending Petitioner's motion for publication) of the District of Columbia Court of Appeals on denial of Petitioner's motion for rehearing, dated February 1, 1989, on a Judgment of December 12, 1988, appearing in the Appendix hereto at page A1.

Related opinions between the parties decided on April 28, 1987, reported as Vemhoff v. INMANCO, 528 A 2d 1205 (D.C. App. 1987 and decided on January 24, 1983, reported as Vemhoff v. INMANCO, 455 A 2d 897 (D.C. App. 1984).

JURISDICTION

The denial of Petitioner's motion for rehearing of the judgment of the District of Columbia Court of Appeals was entered on February 1, 1989. This Court's jurisdiction is invoked through Saunders v. Shaw, 244 U.S. 317; Mullane v. Central Hanover Tr. Co., 339 U.S. 306 and Kremer v. Chemical Const. Corp., 102 S Ct 1883.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment XIV, Section I

"No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner's claim began ten (10) years ago. It contained two counts: one in contract and one in quasi-contract.

Acting pro se, Petitioner brought his case to the District of Columbia Court of Appeals, after summary judgment against him.

Walter H.E. Jaeger, professor emeritus of Georgetown and editor of Williston on Contracts, 3d ed. overturned for the Petitioner summary judgment on appeal.

In the reported decision, Wemhoff v. INMANCO, the D.C. Court of Appeals recognized that the parties' oral contract satisfied the D.C. Statute of Frauds and that Petitioner also alleged:

> "... a resulting trust in the funds he sought had been created and that, since appellees had retained these contributions, they had been unjustly enriched." Wemhoff v. INMANCO, 455 A 2d 897,899 (D.C. App. 1984)

The case was then remanded for trial. The principle basis for remand and due to the bifurcated pre-trial order of the case it was heard on the oral contract only. The question of Petitioner's claim was whether, by oral contract, he was entitled to commissions arising out of tax shelter annuity sales made before his discharge as Respondents' agent. Evidence produced at trial revealed that under the parties' oral contract it had not.

Yet, since the contract was partly performed by the Petitioner, namely he had procured all of the clients from which commissions arose, the trial court made a finding that commissions were not based on "servicing" alone as the Respondents had proferred, but depended as greatly on the "procurement" of the Petitioner, salesman.

The split finding of the trial court (District of Columbia Superior Court) posed

a dilemma for the D.C. Court of Appeals. In its decision under Wemhoff v. INTANCO, 528 A 2d 1205 (D.C. App. 1987) it chastized the Petitioner for not producing evidence of a quantum meruit nature to sort out the value of the performence Wemhoff had furnished and that which he was incapable of performing, namely "servicing" of accounts he had brought into existence, but were beyond his reach once he was discharged as Respondents' agent.

District of Columbia Court of Appeals groped for evidence that would make the Petitioner whole. Under any unitary trial standard the Petitioner would be saddled with the burden the Court foresaw was necessary to re-arrange the unbending contract once the Petitioner had begun his performence. This is how the Court put it:

> "Apparently, neither the trial court nor either party entertained this legal theory of apportionment . .. neither party offered

> evidence assigning relative values to procurement and servicing. Wemhoff v. INMANCO, 528 A 2d 1205,1208 (D.C. App. 1987)

The only identifiable evidence that could evaluate the Petitioner's performence and account for his proportional share of the commissions (some $100,000 or more) was through the theory plead as Count Two by Petitioner, quantum meruit, the very phase of the trial which was bifurcated in pre-trial motions with concurrence of the Respondents. See generally, Perry v. Al George Inc., 428 So. 2d 1308 (La. Sup. Ct. 1984); TVL Assoc. v. A&M Const. Corp., 474 A 2d 156 (D.C. App. 1984).

On Petitioner's "Petition for Re-Hearing and Rehearing en banc" he brought to the D.C. Court of Appeal's attention the matter of the trial court's formal bar on value-damage evidence, but to no avail.

Petitioner treated the foregoing trial and appeal as intended by the courts in the District of Columbia, namely tried on a contract basis only.

Petitioner then sought the relief noted by the District of Columbia Court of Appeals by filing a new action dealing principly with the bifurcated Count II (quantum meruit) alluded to in the former opinions of the D.C. Court of Appeals.

In the 1987 filing of Wemhoff v. William E. Floria & INMANCO (both Respondents are the same) the Superior Court of the District of Columbia dismissed the case on res judicata grounds and it was summarily affirmed by the D.C. Court of Appeals. See Appendix A1 for the Court's Judgment.

Both on the trial court level on rehearing and at the appeals level, the Petitioner argued the constitutional question that he was being denied his Day in Court

guaranteed by the Due Process clause of the Fourteenth Amendment to the Constitution. Petitioner argued that "No full and fair opportunity" was accorded him by a denial to prove the unjust enrichment phase of his action. The fact that the D.C. Court of Appeals had acted to deny him the unitary right of a full blown trial in the first action of Wemhoff v. INMANCO fell again on deaf ears before the Court.

Petitioner maintains by this record, that one-half of his original cause of action was arbitrarily severed from the capability to produce evidence, sorely needed by the Court in the first action, and at minimum should have been available in the second action of the parties, since no res judicata was in force. Petitioner cites the United States Supreme Court for its interpretation of Petitioner's right to a "full and fair" trial and not one severed and left untried. See Saunders v. Shaw,

244 U.S. 317; Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313.

Although it is entirely probable that in the first action the D.C. Court of Appeals was unaware of the bifurcated nature of the trial and the prejudice to the Petitioner, the Court became aware of the dissection in Petitioner's post opinion motions for rehearing, but nothing more than a denial of such motion was ever handed down by the Court. No comment on the constitutional ramifications were ever forthcoming.

As the quasi-contractual phase of the Petitioner's case was formally barred from the first action, the constitutional question which matures for this petition was addressed more properly during the res judicata dismissal at trial and on appeal in the second attempted action between the parties of which there is yet to be a reported decision. The unrepor-

ted opinion of the D.C. Court of Appeals is of a summary nature and does not reveal the constitutional premises of the opinion. **See Appendix A1**

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO EXAMINE THE MINI TRIAL EXPLOSION IN STATE COURTS (HERE THE DISTRICT OF COLUMBIA) WHERE CLAIMANTS ARE HINDERED BY ARBITRARY RESTRAINTS ON THEIR ABILITY TO CONDUCT A "FULL AND FAIR" TRIAL FREE OF PREJUDICE AND COURT COMPULSION TO OVERLAY PROCEDURAL DEFICIENCIES WITH RES JUDICATA.

The Superior Court's decision to arbitrarily sever Petitioner's claim into a liability proceeding, and then await a Petitioner verdict, before entering the damage phase, struck at the heart of Petitioner's case. While in the midst of trial, the Petitioner had no evidence of a damage/value nature to call up and apportion out-of-contract a remedy that was available to him: the worth of his partial performence.

Well before trial, Petitioner was stumped in his attempt to gather evidence of an accounting nature to show the overwhelming proportion of commissions collected by the Respondents as mere "servicing" agents for Petitioner's highly publicized and sought after "procurement" of such clients. Because of the arbitrary check by the court on damage related evidence, Petitioner was rebuffed constantly by court sanctioned protective orders designed to postpone evidence suitable if the Petitioner won a verdict on contract.

That same evidence, it soon became apparent, also was inextricably tied to his successful production of quantum meruit belonging to the quasi-contractual side of his pleading.

Whereas, in the norm, a plaintiff, like the Petitioner is held to the liberal joinder rules of Federal Rule 42(b), simularly stated in the District of Columbia, to avoid res judicata restraints,

in the case of formal bars on their production at trial, the District of Columbia, both at trial level and on appeal, can conveniently bypass its own procedural restrictions and fault the Petitioner for not having found a way to fully present his case.

In earlier times, the claimant was free to pursue his claims in two separate trials. See Restatement on Judgments Section 25 h.

In modern times that freedom to pursue contract and restitutional trials separately is thwarted by the liberal joinder rule and if not claimed in advance res judicata sets in. But with the procedural bar placed on the bringing of separate claims into the same action there is a mistaken notion that,as here,the Petitioner is faulted and cannot redress the court's arbitrary restraints on his trial in a separate action.later.

It is as though the court does not want to tamper with the progress it has gone to lengths to promote. While the District of Columbia courts push further the concept of the mini trial in the name of clearing the backlog of cases, an anarchial procedure is at work to diminish the Petitioner's sanctity of trial. In the name of expedited trial, the litigant, as the Petitioner here, has not only had his trial squandered by court procedure, but finds the D.C. Court of Appeals at the ready to condemn the Petitioner for not raising the very issues at his trial which the apparatus of the lower court in the District of Columbia had already swept from him in the name of expedition.

Respectfully submitted,

Daniel M. Wemhoff

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Pro Se, J.D.

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APPENDIX

OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

(Decided December 12, 1988, Rehearing and Rehearing en banc denied, February 1, 1989.)

DISTRICT OF COLUMBIA COURT OF APPEALS

DANIEL M. WEINHOFF,

Appellant,

v.

WILLIAM E. FIORIA & INVESTORS MANAGEMENT CORP. OF AMERICA,

Appellees.

BEFORE: Newman and Terry, Associate Judges

J U D G M E N T

On consideration of the motion of appellee for summary affirmance, the motion of appellant to incorporate the record on the previous case between these same par-

ties on appeal and to include appendix II in the appellant's brief and opposition to the motion for summary affirmance, and the motion of appellant to oppose summary affirmance and for summary reversal and remand to the trial court on the triable issues and to incorporate appellant's already filed brief into the argument, and the responsive pleadings with respect thereto, it is

ORDERED that the motion for summary affirmance is granted. It is

FURTHER ORDERED AND ADJUDGED that the judgment on appeal be and it hereby is affirmed. It is

FURTHER ORDERED that the motion to incorporate the record of the previous case and to include appendix II in appellant's brief and the motion of appellant for summary reversal and remand to the trial court are denied. It is

FURTHER ORDERED that the motion of appellant to merge appellee's motion for summary affirmance response into appellant's final brief scheduled is denied as moot.

FOR THE COURT:

RICHARD B. HOFFMAN
Clerk of the Court